

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
June 19, 2008 Session

**KRISTI LEANNE COSNER v. CHARLES ARTHUR COSNER**

**Appeal from the General Sessions Court for Loudon County  
No. 9156 William H. Russell, Judge**

---

**E2007-02031-COA-R3-CV Filed August 22, 2008**

---

In this post-divorce case, the primary issue presented is whether the evidence preponderates against the trial court's determination that custody of the parties' two children should be changed from the mother to the father. After a brief hearing at which neither the mother nor her counsel was present, the trial court applied a comparative fitness analysis without discussing or ruling upon whether a material change of circumstances had occurred. The trial court held it to be in the children's best interest to transfer custody from the mother to the father because the mother had allegedly been living with a man to whom she was not married and who was separated from, but still married to, someone else. We hold that the evidence does not establish a material change of circumstances justifying a change in custody in the absence of proof that the mother's alleged conduct has affected the children in an adverse way. We, therefore, reverse the judgment of the trial court with instructions to the trial court to dismiss Father's counter-petition for change of custody and remand for such further action as may be necessary consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Reversed;  
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Paul Dillard, Maryville, Tennessee, for the Appellant, Kristi Leanne Cosner.

Joseph H. Crabtree, Jr., Sweetwater, Tennessee, for the Appellee, Charles Arthur Cosner.

**OPINION**

***I. Background***

The parties, Kristi Leanne Cosner ("Mother") and Charles Arthur Cosner ("Father") were divorced by decree entered on January 31, 2005. Two children had been born to the marriage: William Blake Cosner (born on 10/21/89) and Anjelika Marie Cosner (born on 7/8/93). The agreed permanent parenting plan was incorporated by reference into the divorce decree; it provided that

Mother was the primary residential parent, with visitation provided to Father every Wednesday from 6:00 p.m. until Thursday at 8:00 a.m., every other weekend, various holidays, and two weeks in the summer.

On March 24, 2006, Mother filed a petition “to modify and enforce final decree of divorce” alleging that Father had not paid one-half of medical expenses for the children as agreed in the permanent parenting plan, and that Father “has had a significant increase in salary and the child support should therefore be modified to reflect said increase.” Father answered and filed a counter-petition alleging that Mother had “unilaterally taken steps to deny [Father] any visitation with his youngest child” Anjelika, that Mother had not paid one-half of the children’s extracurricular expenses as agreed in the permanent parenting plan, and that Mother had failed to provide Father with summer visitation as set forth in the parenting plan. Father later amended his counter-petition to allege a material change of circumstances warranting a change of custody, stating the following particulars:

[Mother] has alienated Anjelika from [Father] and has perniciously engaged in a pattern of conduct designed to undermine [Father’s] relationship with Anjelika.

[Mother] does not model proper parental behavior in that she has maintained a number of sexual relationships with men, brought them to her home with the children present, some of whom are married.

[Mother] is unstable and is prone to outbursts of anger in the presence of the children, which is detrimental to their well-being and is calculated to undermine the children’s relationship with [Father].

The modification of the Permanent Parenting Plan as designating [Father] as the Primary Residential Parent is in the best interest of the parties’ children.

Three days before the hearing, Mother’s attorney, A. Wayne Henry, filed a motion to withdraw as her counsel. The day of the hearing, Mr. Henry appeared in court and presented his motion to withdraw, but neither his client (Mother) nor a witness subpoenaed by Father (Mother’s alleged live-in boyfriend and the father of her newborn child) appeared in court. The following colloquy occurred at the beginning of the hearing:

THE COURT: Where is your client? Is this her?

MR. HENRY: No, it isn’t. I’m not exactly sure, Your Honor. I talked – I tried to call and talk to her in the last – since this morning and – I mean, she was somewhere between taking her child – taking care of her child and going to work.

THE COURT: All right. Are you ready?

MR. CRABTREE [Father's attorney]: Yes, Your Honor.

THE COURT: All right. Everybody that's going to testify or thinks they may testify in this matter, please stand and raise your right hand. Hold on a minute. Are you withdrawing?

MR. HENRY. Yes, Your Honor. I have a motion to withdraw.

THE COURT: Have you got an order?

MR. HENRY: I do not.

THE COURT: Prepare an order to be released.

(Whereupon, Wayne Henry left proceedings.)

\*

\*

\*

MR. CRABTREE: Your Honor, I would like to note for the record that I had subpoenaed David Neubert and it was referenced – there was an order entered on the continuance from the last time we were here. He was under subpoena. And it stated – he was under subpoena for the last hearing. The order stated that he would remain under subpoena until today. And for the record, he is the boyfriend of Mrs. Cosner, the former Mrs. Cosner.

THE COURT: He's not here. Do you have a remedy in that? You can either ask for a continuance or you can proceed.

MR. CRABTREE: Well, I would prefer to proceed.

THE COURT: All right.

Two persons testified at the hearing: a licensed clinical social worker who had been seeing Anjelika for counseling, and Father. After the brief hearing, the trial court entered an order ruling that Father “is the best person to have primary custody and to be designated the primary resident for parent [sic] of the parties’ two minor children.” The trial court further found that “because of [Mother’s] co-habitation with a married man in the presence of the children and with whom she has conceived and born [sic] a child is not a fit or proper person to have the responsibilities of primary residential parent.” The trial court’s order disallowed Mother from any visitation with her children until she “ceased her cohabitation with a man to whom she is not married . . . .” As already noted, the trial court provided no discussion or finding related to whether a material change of

circumstances had occurred that affected the children's well-being and that justified a change of custody, as required by Tennessee statute and case law.

Shortly after the trial court's order, Mother filed a motion for new trial and/or to alter or amend the judgment, alleging that her then-counsel Mr. Henry had advised her shortly before the hearing that "she would have thirty days to obtain new counsel and at least sixty days for a new hearing date," and that Mr. Henry had advised her that she did not need to be at the hearing, which would be postponed. Following a hearing on Mother's post-judgment motion, the trial court denied it, and Mother's appeal to this court followed.

## ***II. Issue Presented***

The issue we address in this appeal is whether the trial court erred in changing primary custody of the parties' children from Mother to Father.

## ***III. Analysis***

### ***A. Standard of Review***

In a non-jury case, ordinarily our review is *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993). In the present case, the trial court made virtually no findings of fact, and no finding regarding the threshold determination of whether a material change in circumstance had occurred warranting the modification of the parenting plan to change custody from Mother to Father. When the trial court fails to make factual findings, there is nothing to which the presumption of correctness can attach. ***Hickman v. Continental Baking Co.***, 143 S.W.3d 72, 75 (Tenn. 2004); ***Curtis v. Hill***, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006); ***Kesterson v. Varner***, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005); ***Archer v. Archer***, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). Under these circumstances, "we must conduct our own independent review of the record to determine where the preponderance of the evidence lies." ***Brooks v. Brooks***, 992 S.W.2d 403, 405 (Tenn. 1999); ***Kendrick v. Shoemaker***, 90 S.W.3d 566, 570 (Tenn. 2002); ***Devorak v. Patterson***, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995).

Trial courts are vested with wide discretion in matters involving custody of children. ***Edwards v. Edwards***, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973). Accordingly, a trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 88 (Tenn. 2001). We are aware of the tremendous impact a custody decision has on the life of a child. Although trial courts must be able to exercise broad discretion in matters of child custody and visitation, they still must base

their decisions on the proof and upon the appropriate application of the pertinent principles of law. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). We will not reverse a trial court's decision regarding custody unless the record clearly demonstrates that the trial court has abused its discretion. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). A discretionary judgment of a trial court should not be disturbed unless it affirmatively appears that "the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999) (quoting *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)).

### ***B. Change of Custody***

We begin our review by reaffirming the premise that custody and visitation decisions are among the most important decisions that courts make. *Curtis*, 215 S.W.3d at 839; *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Promoting the child's welfare by creating an environment that promotes a nurturing relationship with both parents is the chief purpose in custody decisions. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996). Because children are more likely to thrive in a stable environment, the courts favor existing custody arrangements. *Id.* at 627; *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or reasonably foreseeable when the decision was made. *Young v. Smith*, 246 S.W.2d 93, 95 (Tenn. 1952); *Steen*, 61 S.W.3d at 327; *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

The governing statute in a case such as this one, Tenn. Code Ann. § 36-6-101(a)(2)(B), provides that in cases wherein a party seeks to modify an existing custody arrangement, the threshold issue is whether a material change in circumstances has occurred since the initial custody determination:

If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

We recognize that the circumstances of children and their parents inevitably change – children grow older, their needs change, one or both parties remarry. But not all changes in the circumstances of the parties and the child warrant a change in custody. There are no hard and fast rules for when there has been a change of circumstance sufficient to justify a change in custody. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A court’s decision with regard to modification of custody is contingent upon the circumstances presented, and the court should consider whether:

- 1) the change occurred after the entry of the order sought to be modified,
- 2) the changed circumstances were not reasonably anticipated when the underlying decree was entered, and
- 3) the change is one that affects the child’s well-being in a meaningful way.

*Kendrick*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002); *Cranston*, 106 S.W.3d at 644. Custody decisions are not intended and should not be designed to reward parents for prior virtuous conduct, nor to punish them for their human frailties or past missteps. *Curtis*, 215 S.W.3d at 840; *Oliver v. Oliver*, No. M2002-02880-COA-R3-CV, 2004 WL 892536 at \*2 (Tenn. Ct. App. M.S., filed Apr. 26, 2004); *Kesterson*, 172 S.W.3d at 561; *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000).

The party seeking to change an existing custody arrangement has the burden of proving that there has been a material change of circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B). If the person seeking the change of custody cannot demonstrate that the child’s circumstances have changed in some material way, the trial court should not reexamine the comparative fitness of the parents, *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a “best interests of the child” analysis. In the absence of proof of a material change in the child’s circumstances, the trial court should not change custody. *Curtis*, 215 S.W.3d at 840; *Hoalcraft*, 19 S.W.3d at 828.

Applying the above analysis to the present case, our review of the record persuades us that the evidence preponderates against a conclusion that Father has proven a material change of circumstances affecting the children’s well-being in a material way that would justify the “drastic remedy” of changing custody. *Curtis*, 215 S.W.3d at 841; *see also Perez v. Kornberg*, No. M2004-01909-COA-R3-CV, 2006 WL 1540254 at \*16 (Tenn. Ct. App. W.S., filed June 6, 2006); *Oliver*, 2004 WL 892536 at \*5.

The first of the two persons to testify at the hearing was Stephanie Viars, a licensed clinical social worker who had been seeing Anjelika for counseling for approximately nine months. Ms. Viars stated that she began counseling with Anjelika “to help [her] relationship with her dad.” Ms. Viars testified that Anjelika was uncomfortable with Father’s new wife and that was part of the reason why Anjelika did not want to visit with Father. Ms. Viars testified that Anjelika “didn’t speak very much about her mother’s home at all,” and upon specific questioning, stated that Anjelika did not tell her that Mother was living with a married man and did not tell her that Mother was

pregnant with that man's child. When asked whether she believed it was appropriate for Anjelika "to live in a home with a mother who's co-habiting with a married man with whom she's just had a child," Ms. Viars stated, "[t]hat's a moral issue that I don't think that I'm in a position to comment on."

Father also testified at the hearing. When asked why he believed that a change of custody was appropriate under the circumstances, Father stated, "well, at the present time, [Mother] is currently living with a man who is married, who, you know, is still married, and has a new baby by him." Regarding the alleged live-in boyfriend, Father's attorney asserted to the trial court that there was a divorce action (presumably the boyfriend's) filed in February of 2005 in Knox County and "no further action has been taken on it." Father alleged that the boyfriend moved in with Mother in late 2006, apparently nearly two years after his divorce action had been filed and was pending. When asked how he knew this, Father stated, "you could drive by and see his vehicle, and also my children told me." Father further testified that Mother had "cussed my wife in public several times," and once called his new wife a "bitch" in front of their daughter. Father presented no evidence tending to show that the children's relationship with Mother and their residence at her house was in any way detrimental to their well-being.

Following the hearing, the trial court ruled that custody of the children should be changed and that Father should be designated primary residential parent, and entered an order providing the following:

[Father] is the best person to have primary custody and to be designated the primary resident for parent [sic] of the parties' two minor children, William Blake Cosner and Anjelika Marie Cosner. [Father] has established that he has a more than adequate residence, can provide a safe and stable home life and a good moral environment for the parties' minor children.

[Mother] shall be entitled to standard co-parenting as set forth in the local rules for the General Sessions Court, Loudon County, Tennessee, provided however, that said co-parenting time shall not begin until such time as [Mother] has ceased her cohabitation with a man to whom she is not married and that at no time shall [Mother] be allowed overnight co-parenting time with the parties' minor children while she is engaged in such a relationship. The Court specifically finds that because of [Mother's] co-habitation with a married man in the presence of the children and with whom she has conceived and born a child [sic] is not a fit or proper person to have the responsibilities of primary residential parent.

When the proof presented by Father contained in the record is examined, it is doubtful that Father proved by a preponderance of the evidence his allegation that Mother was living with a man who was still married to someone else. But even assuming *arguendo* that the allegations of cohabitation and recent birth of Mother's third child by her live-in paramour are true, they are

insufficient to justify a change of custody under the circumstances. A custodial parent's non-marital sexual activities may be appropriately considered in the context of a custody decision. *Curtis*, 215 S.W.3d at 841; *Earls*, 42 S.W.3d at 890. While we do not condone Mother's alleged conduct, we have repeatedly pointed out that "cohabitation alone does not necessarily provide grounds for changing custody when there is no proof that it has or will adversely affect the children." *Id.*; see *Nelson v. Nelson*, 66 S.W.3d 896, 902 (Tenn. Ct. App. 2001); *Fain v. Fain*, No. M1999-02261-COA-R3-CV, 2000 WL 1879548 at \*5 (Tenn. Ct. App. E.S., filed Dec. 29, 2000); *Varley v. Varley*, 934 S.W.2d 659, 666-67 (Tenn. Ct. App. 1996); *Sutherland v. Sutherland*, 831 S.W.2d 283, 286 (Tenn. Ct. App. 1991). A parent's sexual conduct, if practiced inappropriately or indiscriminately, can adversely affect a child's well-being, and in those cases, such conduct can be an important factor in custody determinations. *Berry v. Berry*, No. E2004-01832-COA-R3-CV, 2005 WL 1277847 at \*5 (Tenn. Ct. App. E.S., filed May 31, 2005). In *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999), the Tennessee Supreme Court acknowledged that "sexual indiscretion does not, by itself, disqualify a parent from being awarded custody, but it may be a relevant factor if it involves the neglect of the child." See also *Lockmiller v. Lockmiller*, No. E2002-02586-COA-R3-CV, 2003 WL 23094418 at \*5 (Tenn. Ct. App. E.S., filed Dec. 30, 2004).

The record before us offers no proof that Mother neglected the children because of sexual indiscretion, nor that they suffered any adverse consequence because of the presence of her boyfriend, allegedly the father of the children's half-sibling, at her residence. Father, who had the burden of proof to establish a material change of circumstances, presented no evidence regarding the children's health, schooling, welfare, or general well-being while in Mother's custody. The parties' son is barely mentioned in the entire record at all.

As we have already noted, a trial court should not fashion a custody decision as punishment of a party for human frailties, past missteps, or perceived moral shortcomings in the absence of demonstrated adverse consequence to the children. *Curtis*, 215 S.W.3d at 840; *Kesterson*, 172 S.W.3d at 561; *Earls*, 42 S.W.3d at 885; *Oliver*, 2004 WL 892536 at \*2. Not only does the language of the trial court's order indicate that the trial court did exactly that in its ruling, but the literal import of the trial court's order that Mother's "co-parenting time shall not begin until such time as [Mother] has ceased her cohabitation with a man to whom she is not married" means that the trial court barred the children from all contact with their mother, who had raised them from birth, until she stopped living with the alleged father of her newborn child. Under the circumstances presented here, we hold that the evidence preponderates against the conclusion that a material change of circumstances occurred that warranted a change of custody from Mother to Father, and we further hold that the trial court abused its discretion in ordering the change of custody.

#### ***IV. Conclusion***

The trial court's judgment modifying the parenting plan by changing custody of the children from Mother to Father is reversed. Considering the successful outcome of Mother's appeal in this



matter, the trial court's award of attorney's fees and court costs against Mother is also reversed. The case is remanded to the trial court with directions to dismiss Father's counter-petition, and for such further action as may be necessary, consistent with this opinion. Costs on appeal are assessed to the Appellee, Charles Arthur Cosner.

---

SHARON G. LEE, JUDGE